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ALEXANDER L. STEVAS
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Nos. 84-884 and 84-885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, *et al.*,
Respondents,

NORFOLK AND WESTERN RAILWAY COMPANY, CHESSIE SYSTEM RAILROADS, AND SEABOARD SYSTEM RAILROAD, INC.
Petitioners,

v.

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Respondents.

On Petitions For Writs of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF FOR RESPONDENTS COAL EXPORTERS ASSOCIATION AND NATIONAL COAL ASSOCIATION IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Court of Appeals properly determined that the Interstate Commerce Commission's exemption of the rail transportation of export coal from the Interstate Commerce Act misconstrued the standards for an exemption under 49 U.S.C. §10505(a).

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Petitioners,

v.

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS COAL EXPORTERS ASSOCIATION AND NATIONAL COAL ASSOCIATION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-47a) is reported at 745 F.2d 76. The opinion of the Interstate Commerce Commission (Pet. App. 50a-125a) is reported at 367 I.C.C. 570.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1984. No petition for rehearing was filed with the Court of Appeals. The petitions for a writ of certiorari were filed on December 3, 1984.[1] This Court has jurisdiction under 28 U.S.C. §§1254(1) and 2350(a).

STATUTORY PROVISIONS INVOLVED

The provisions of the Interstate Commerce Act principally involved are the exemption provision, 49 U.S.C. §10505, and the rail transportation policy, 49 U.S.C. §10101a. (App. 150a-152a). The Administrative Procedure Act, 5 U.S.C. §§551-706, is also involved, particularly section 706 regarding judicial review.

STATEMENT OF THE CASE

This case involves a decision by the Interstate Commerce Commission (ICC or Commission) to exempt the rail transportation of export coal from all regulatory requirements of the Interstate Commerce Act. Among the provisions from which rail carriers were exempted are protection for shippers against unreasonably high rates, the common carrier obligation, the commodities clause, and the prohibition against discrimination. The Commission acted pursuant to 49 U.S.C. §10505(a), which authorizes it to exempt persons or services from provisions of the Act where the Commission finds "that the application of a provision of—

> (1) is not necessary to carry out the transportation policy of section 10101a of [title 49]; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of [the Act] is not needed to protect shippers from the abuse of market power.

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[1] A group of Western Railroads, parties below, did not file a petition for writ of certiorari, and have not filed a brief in support of the petitions in Nos. 84-884 and 84-885.

The Court of Appeals vacated and remanded the ICC's exemption of the rail transportation of export coal from all of the Interstate Commerce Act. Its unanimous decision held that the Commission had unlawfully interpreted the two statutory exemption tests by ignoring the protections for shippers against unreasonably high rates maintained in the Staggers Rail Act of 1980.

1. The Staggers Rail Act of 1980

The Staggers Act[2] amended the Interstate Commerce Act by modifying the criteria for determining when the ICC should have jurisdiction to hear rate challenges and when the marketplace should be relied upon to set competitive rates. While granting railroads increased rate flexibility, the authors of the Staggers Act declared it essential that continued protection from unreasonably high rates be afforded to captive shippers (*i.e.*, those without competitive transportation alternatives).

The Staggers Act was a compromise which passed with the support of the shipper community because of the assurance, built into the structure and policies of the legislation, that regulation would be maintained where marketplace competition was insufficient to protect shippers and the public from abusive practices by the railroads (Pet. App. 8a-9a and n.6, 41a-45a). As stated by Congressman Rahall, author of a key compromise amendment which enabled the legislation to pass:

> [M]y involvement in the rail legislation now before the House was to assure that a balance was struck, a balance which would allow carriers to achieve adequate revenues while providing protection for captive shippers against unjustifiably high rail rates. I believe this balance has been struck and urge support for the Conference Report.[3]

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[2] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

[3] 126 Cong. Rec. H10086-87 (daily ed., Sept. 30, 1980). A bill reported by the House Committee on Energy and Commerce was rejected on the floor because of shipper opposition. 126 Cong. Rec. H6428-29 (daily ed., July 24, 1980). Thereafter, Mr. Rahall and others prepared a substitute that better accommodated shipper interests, and the House of Representatives passed this substitute. 126 Cong. Rec. H8628 (daily ed., Sept. 9, 1980).

To implement the dual objectives of rate flexibility and protection for captive shippers, Congress established a numerical jurisdictional threshhold for rate challenges.[4] Above that level, ICC protection against unreasonably high rates is to continue where the rail carrier has "market dominance" over the transportation to which the rate applies.[5] In a rate reasonableness case the "Long-Cannon Amendment" requires the ICC to consider whether any particular commodity is paying an unreasonable share of the carriers' revenues.[6]

Congress considered coal traffic to be the prime example of a commodity over which railroads possess market dominance, and cautioned that railroads should not be permitted to meet all of their revenue needs by further high rates on coal traffic.[7] The Conference Report expressed Congress' special concern for coal:

> The Conferees intend that this [rail transportation] policy include the encouragement and promotion of the transportation of coal by rail in accordance with the objective of energy independence at rates which do not exceed a reasonable maximum where there is an absence of effective competition.[8]

A key element of the rail transportation policy is the requirement that the ICC "maintain reasonable rates where there is an absence of effective competition. . . ." 49 U.S.C. §10101a(6). As recognized by the Court of Appeals, this policy

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[4] 49 U.S.C. §10709(d)(2). See Western Coal Traffic League v. United States, 719 F.2d 772 (*en banc*) (5th Cir. 1983), *cert. denied*, 104 S.Ct. 2160 (1984). The jurisdictional ratio is now 1.8 times the railroad variable cost of the movement.

[5] 49 U.S.C. §10709(a),(c).

[6] 49 U.S.C. §10707a(e)(2)(C).

[7] S. Rep. No. 470, 96th Cong., 1st Sess. at 7 (1979).

[8] H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. at 80 (1980). The importance of coal to Congress is underscored by the fact that the quoted language was the only substantive comment in the Conference Report on the rail transportation policy in section 1010la.

applies to export coal as well as to domestic coal shipments (Pet. App. 35a).[9]

The exemption provision is not intended to remove protection against unreasonably high rates for the transportation of coal and other bulk commodities where there is an absence of effective competition from another railroad or other modes. The Senate Committee's provisions, which were incorporated by the Conference Committee into the bill that finally passed, "allows the Commission to exempt important areas of competitive traffic and to concentrate its resources on the problems of noncompetitive traffic where continued regulation is most needed."[10] The Senate Committee emphasized that "greater use of the exemption power should not be at the expense of captive shippers who have no reasonable transportation alternatives."[11] The Conferees stated that the ICC was "to determine where [there] can be deregulat[ion] consistent with the policies of Congress."[12] These legislative expressions are incorporated in the statutory requirement that an exemption be granted only if regulation is not necessary to carry out the rail transportation policy or protect shippers from an abuse of market power. 49 U.S.C. §10505(a).

2. The ICC's Exemption Decision

Because of a rapid expansion of U.S. exports of coal beginning in 1978 and 1979, U.S. coal shippers became increasingly concerned about the level of railroad rates from mines to ports. During this period, the Coal Exporters Association (CEA) filed several protests against rate increases on export coal.[13] On

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[9] Specific Congressional concern for export coal was expressed, *e.g.*, by Mr. Rahall. 126 Cong. Rec. H8551 (daily ed., Sept. 9, 1980).

[10] S. Rep. No. 470, 96th Cong., 1st Sess. at 43 (1979).

[11] *Id.*

[12] H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. at 105 (1980).

[13] Ex Parte No. 349, Increased Freight Rates, 1978 (protest and petition for suspension filed May 30, 1978); Ex Parte No. 357, Increased Rates, 1978 (protest filed December 1, 1978); Ex Parte No. 368, Increased Rates, 1979 (protest filed July 11, 1979).

March 27, 1981, CEA filed a complaint challenging as unreasonably high virtually all of the rail rates for transporting export coal to coastal ports and certain docks on the Ohio River.[14] Evidence filed concurrently with the complaint showed that (1) 95 percent of the exporters' mines have no transportation alternative for their shipments of export coal except the single railroad serving the mine and (2) the challenged rates yielded revenues two to three times the variable costs of providing the rail service, indicating substantial market power.

Shortly after CEA challenged the export coal rates, the Norfolk and Western Railway petitioned the Commission to exempt movements of export coal via Atlantic and Gulf ports from the provisions of the Interstate Commerce Act. In September 1981 the Commission issued a notice of proposed exemption, expanding the case to cover export coal transportation via all ports nationwide.[15]

The Departments of State and Commerce, the Office of the Special Trade Representative, CEA, NCA, other export coal producers, shippers of other bulk commodities, port operators, and water carriers, and ocean-going carriers opposed the exemption. Opposition was also expressed by more than a dozen coal buyers from Europe and Japan, as well as by foreign governments. The railroad proponents of the exemption were joined only by the Department of Transportation.[16] At oral argument Senators Huddleston (Ky.), Specter (Pa.) and Hatch (Utah) appeared and argued against the exemption.

On March 3 and 4, 1983, the Commission issued press releases announcing that a 3-2 majority had voted to exempt export coal. On June 9, 1983, the Commission issued its written

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[14] Coal Exporters Ass'n, *et al.* v. Atchison, Topeka and Santa Fe Ry., *et al.*, I.C.C. Docket No. 38301S. The complaint, exhibits and verified statements attached thereto are part of the record in the ICC's exemption proceeding.

[15] Ex Parte 346 (Sub-No. 7), Notice of Proposed Exemption, 46 Fed. Reg. 44529 (September 4, 1981).

[16] The Department of Justice's comments expressed no position on the ultimate merits of the exemption.

decision exempting the rail transportation of export coal from the entire Interstate Commerce Act applicable to rail carriers (Pet. App. 50a-92a, 114a-115a). Chairman Taylor filed a dissenting opinion (Pet. App. 92a-113a).

Both the majority and the dissenters agreed that export coal originated on the lines of an eastern rail carrier is generally transported in single-line service to that carrier's export coal facility and that very few mines are served by more than one railroad (Pet. App. 61a; see 95a). The Commission majority, however, found the existence of transportation alternatives such as truck, barge and coal slurry pipeline (Pet. App. 61a-62a). Chairman Taylor responded that coal slurry pipelines do not exist. He said that truck and barge competition are unavailable for the great majority of export coal shippers and, where present, are an ineffective competitive force (Pet. App. 95a-96a).

The majority also said that coal from Appalachia, which constitutes the vast bulk of export coal, faces competition from midwestern and western U.S. sources (Pet. App. 62a-63a). Chairman Taylor countered by noting testimony by the railroads that the largest western U.S. reserves do not produce coal of export quality, and that midwestern coal has too much sulfur to compete with eastern coal in either the metallurgical or steam coal markets (Pet. App. 96a-97a).

The Commission majority also concluded that certain of the larger export coal shippers own mines on different railroads and can play one railroad off against another and thus achieve bargaining leverage (Pet. App. 61a). Chairman Taylor again noted record evidence that only a small fraction of the mines were controlled by companies with mines on more than one railroad. Even in those cases, he said, it would be rare for coal located on one railroad to be substitutable for that on another in terms of availability and conformance with the quality specifications of the particular buyer (Pet. App. 97a-98a).

The Commission never found that railroads lack market power. Consequently, its decision turned to whether statutory

protections are needed to protect shippers from an abuse of that market power. It said, "the issue is not whether deregulation will give the railroads *some* market power but whether we conclude that an exemption will result in abuse" (Pet. App. 82a, emphasis in original). To determine whether the "abuse of market power" requirement was satisfied, the Commission first inquired whether world competition for coal places a "cap" on the delivered price of U.S. coal to foreign buyers and thereby restrains American rail carriers' rates.[17] This cap, the Commission maintained, would deter railroads from raising their rates for fear of pricing U.S. coal out of foreign markets and losing the attendant export coal transportation business. However, it recognized that the world cap does not answer how the railroad and coal shipper would divide the profits above railroad and shipper costs within that price ceiling (Pet. App. 67a).

It, therefore, proceeded to the second part of the test for satisfaction of the "abuse of market power" statutory prerequisite—whether railroads having market power over export coal shippers would appropriate all of the rents. The ICC set forth its interpretation of the test as follows (Pet. App. 83a, emphasis added):

> This fact [the world market's restraint on rail rates] means that the issue of the potential for market abuse by the railroads must be analyzed in the context of the question of whether the railroads will be able to appropriate all of the economic rents created by the difference in the costs for producing and shipping export coal and the world market price for that coal.

The Commission predicted that the railroads would indeed appropriate the available rents above shipper costs:

> Exemption will free the railroads to maximize their revenues by pricing on the basis of market demand and each mine's long run marginal cost (including a return on cost of capital).

(Pet. App. 75a).

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[17] Chairman Taylor disagreed that a world price cap would protect export coal shippers from unreasonable rail rates (Pet. App. 94a, 95a).

The ICC adopted the legal standard that abuse of market power would not occur unless the railroads set their rates so high that they priced the traffic out of the market or rendered coal production unprofitable in a particular case. This the ICC predicted would not occur because "it would be contrary to [the] carrier's interest to attempt to abuse its market power by raising rates to the point where the traffic stops" (Pet. App. 85a).

With respect to the remaining statutory test under the exemption provision—the consistency of the exemption with the rail transportation policy of 49 U.S.C. §10101a, the Commission determined (Pet. App. 73a, emphasis added) that "[c]ontinued regulation of export coal traffic is not necessary to carry out *any* of the 15 elements of the rail transportation policy . . ." Its discussion of these policies, however, mentioned paragraph (6)—the maintenance of reasonable rates where there is an absence of effective competition—only once, and then in a footnote that implied it was not applicable to export coal (Pet. App. 71a, n. 32). Although the ICC stated at several points that post-exemption rates would be "reasonable" and "rational" (Pet. App. 75a, 77a), it did not explain what these terms mean or state what standard it had applied to reach this conclusion.

3. The Court of Appeals' Decision

The Court of Appeals vacated and remanded the exemption decision, holding that the ICC's conclusions about the prerequisites for an exemption were an unreasonable interpretation of the statute (Pet. App. 5a).[18] It said that the two findings required by section 10505(a) are "particularly intertwined in this case," and that the policy in section 1010la(6) "substantially overlaps with the provision relating to 'protect[ing] shippers from the abuse of market power'" (*Id.*).

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[18] The Court did not reach several challenges to the ICC decision, including its failure to comply with procedural requirements of the Administrative Procedure Act (Pet. App. 5a-6a, n.4), and the absence of record evidence to support an exemption from the commodities clause, anti-discrimination provisions and other non-maximum rate sections of the Act.

The Court began its opinion by describing two interrelated challenges to the ICC decision: that the decision was arbitrary and capricious; and that the ICC's interpretation of its exemption authority is unreasonable. The Court's analysis turned more on the latter contention, though it said the two arguments are "closely interrelated" (Pet. App. 7a).

It then presented a general overview of the Staggers Rail Act. This, it said, is not "a simple deregulation of the railroad industry" (Pet. App. 8a). Rather, it is a compromise, the underlying approach of which was

> to move toward much greater reliance on market forces rather than regulation to govern rail carriage, but to temper that move with a policy of retaining regulation where the market would be insufficient to protect shippers and the public from abusive railroad practices.

(Pet. App. 9a). The Court chronicled the numerous descriptions of the Act by conference committee members, sponsors, leading proponents and floor leaders "as a detailed and delicate compromise . . . reducing or eliminating regulation where appropriate and preserving regulatory protection for shippers where necessary" (*Id.* at n.6).

The Court described the purpose of the exemption provision as being "to evaluate on a continuing basis the specific need for the various aspects of the regulatory scheme in particular contexts," and said it gave the ICC very broad authority to eliminate unnecessary regulation. However, it said, the legislative history and the statute make "conditional" the exercise of exemption authority by the ICC (Pet. App. 10a).[19]

After presenting first the views of the ICC majority and then ICC Chairman Taylor's dissenting opinion about rail transportation and the export coal industry (Pet. App. lla-26a), the

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[19] The Court said Congress' delegation of the exemption authority "included guidelines that conditioned the authority so as to preserve the policy balance in the Act." It cited the Conference Report's specification that the ICC's task is "to determine whether [there] can be deregulat[ion] consistent with the policies of Congress" (Pet. App. 10a, 11a).

Court addressed the ICC's predictions of post-exemption railroad behavior and the agency's analysis of the exemption provision's legal standards (Pet. App. 26a-47a). It declared that the limits placed by the statute on the exemption power are satisfied with a "proper finding of an absence of 'market power' and the presence of 'effective competition,' " pointing out that it may make a determination that regulation is "not needed to protect shippers from an abuse of market power", even if there is no effective competition (Pet. App. 28a). However, it said the exemption decision was not premised on either, and that no such finding had been made (Pet. App. 28a, 3la, 35a). Rather, the Court said, the ICC's discussion of how the railroads are likely to behave in an unregulated environment rested on the premise that unregulated railroads would be able and willing to price discriminate among export coal shippers. This, the Court said, citing several antitrust authorities, "clearly assumes some significant degree of railroad monopoly power" (Pet. App. 29a).

With respect to the required statutory finding of consistency with the rail transportation policy, the Court complained that the ICC's analysis had "hardly mentioned the provision of the policy most clearly related to petitioners' claims," the direction in section 1010la(6) " 'to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital" (Pet. App. 34a-35a). The Court read the policy of section 10101a(6) as not only an independent condition on the exemption power through section 10505(a)(1), but also as closely intertwined with the "abuse of market power' " requirement in section 10505(a)(2). It held the ICC's interpretation of section 10101a(6) as allowing an indifference to the division of rents between railroads and shippers to be contrary to the statute's concerns about unreasonable rates and excessive profits (Pet. App. 44a).

The Court then considered the Commission's interpretation of whether regulation is necessary "to protect shippers from an abuse of market power." It noted that the Commission had based

its interpretation on two tests. The first was whether worldwide competition for coal would prevent American rail carriers from unilaterally raising the delivered price for coal to be purchased by foreign users. The second was whether, within this cap, the railroads would be able to appropriate all of the rents (Pet. App. 37a, quoting ICC decision at Pet. App. 83a). The Court said that "[t]hese two elements become, for the Commission, the standard under which it evaluates whether or not an exemption will result in an abuse of market power. In other words, so long as coal shippers are not forced to reduce production . . . and so long as they are not wholly excluded from any economic rents above that level, their rate is 'reasonable' and there is no 'abuse of market power' " (Pet. App. 37a).

The Court concluded that the Commission's standard was an unreasonable construction of the Staggers Act's accommodation between carrier and shipper interests. It said that the ICC's interpretation of the statutory exemption tests "is not one that Congress would have sanctioned" (Pet. App. 40a, quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 104 Ct. 2778, 2782 (1984)).[20] The Court declared that, except for its discussion of a standard which misinterpreted the Staggers Act, the Commission "never attempted to explain in nonconclusory terms how much competition was necessary, or what condition would constitute one of reasonable rates and non-abuse of market power" (Pet. App. 46a).

4. Petitions for Writs of Certiorari

By a 4-3 vote the Commission decided to pursue further judicial review of the Court's decision. Rather than seeking a

[20] The Court repeatedly emphasized that its decision was based on the inadequacy and unreasonableness of the Commission's standard (Pet. App. 37a, 39a, 44a, 47a). It did not make specific determinations about the Commission's conclusions on geographic, intramodal and intermodal competition. Instead, it rejected the Commission's position that these competitive factors justify the exemption because (i) the legal importance that the Commission attributed to them is not clear; and (ii) these factors played a "minimal role" within the legal standard used by the Commission (Pet. App. 45a).

rehearing or *en banc* review, the Commission petitioned for a writ of certiorari in No. 84-884. The Norfolk & Western Railway, the Chessie System Railroads, and the Seaboard System Railroad filed a joint petition in No. 84-885. The United States filed a brief in support of issuance of the writs.

REASONS FOR DENYING THE WRITS

This case meets none of the criteria for review. There is no conflict between the Court of Appeals' decision and that of any other circuit interpreting the exemption provision. The case involves but a single provision of the Interstate Commerce Act and thus presents a "unique question of statutory construction" which does not have precedential significance for other statutes. *Watt v. Alaska*, 451 U.S. 259, 274 (1981) (Stevens, J., concurring).

The arguments advanced in support of review are based on a misreading of the Court of Appeals' opinion and the Commission's decision. The United States erroneously contends that the Commission did not articulate a standard interpreting "abuse of market power" and that the lower court therefore wrongly rejected the standard it attributed to the Commission. Review of the agency's decision shows that the ICC did present a standard, albeit an incorrect one. Moreover, the single "Question Presented" by the United States—whether the Court erroneously required the ICC to engage in a detailed analysis of the reasonableness of post-exemption rates—is not raised by the lower court's decision. The decision in fact requires no such analysis. Rather, the Court correctly vacated and remanded the ICC's exemption decision because the legal standard the ICC applied is contrary to the statute.

The predictions by the proponents of review that the exemption provision will be crippled if the Court of Appeals' decision stands are, therefore, incorrect. The provision will continue to be viable when the Commission applies it properly, as it has many times in the past. The Court of Appeals' decision correctly points

the way for the Commission to carry out the mandate of the Staggers Act to strike a balance between rate flexibility for carriers and protection of captive shippers.

Finally, this is a poor case for review because the ICC's decision contains numerous critical factual errors. It was attacked below as being arbitrary and capricious, as well as "not in accordance with law." 5 U.S.C. §706(2)(A). The Court treated the arbitrariness challenge as "interrelated" with the challenge to the ICC's interpretation of the exemption section, upon which it based its ruling.

a. The United States contends (Brief, 15-16, 18) that the Commission did not articulate a standard for the exercise of the exemption authority and that the Court of Appeals wrongly attributed a standard to the Commission, which it then rejected. Even if accurate, the argument that a court erred clearly is not an issue worthy of Supreme Court review. But, here, the premise is wrong. Contrary to the reading by the United States, the Commission did interpret the "abuse of market power" requirement.[21] After discussing the significance of world-wide competition for export coal, the Commission presented its standard (Pet. App. 83a):

> . . . [T]he issue of the potential for market abuse by the railroads must be analyzed in the context of the question of whether the railroads will be able to appropriate all of the economic rents created by the difference in the costs for producing and shipping export coal and the world market price for that coal.

The Court rejected this test as an unreasonable interpretation of the statutory prerequisite for an exemption: that regulation is not needed "to protect shippers from the abuse of market power", as

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[21] The ICC's petition (at 17) describes the Commission's test as whether post-exemption rates would be reasonable, and acknowledges (at 17, 18) that "the question of the current rates' reasonableness is currently before the Commission." See Coal Exporters Ass'n, *et al.* v. Atchison, Topeka & Santa Fe, *et al.*, ICC Docket 38301S.

well as the requirement of consistency with the rail transportation policy.

b. The predictions by petitioners and the United States about the dire effects of the Court of Appeals' decision do not withstand scrutiny. They warn that the decision requires the ICC to make "individualized, detailed findings" in exemption cases similar to those in rate reasonableness cases and will ban broad exemptions. As a result, they argue, use of the exemption provision will be "crippled."[22]

These characterizations of the decision and predictions find no support in the Court of Appeals' decision. It does not, in fact, require "individualized, detailed findings," and there is no basis for inferring that it does. Rather, the Court repeatedly made clear that its decision requires the ICC to establish standards that are not unreasonably incompatible with Congress' purpose in placing the the rail transportation policies, the market dominance provision, and the maximum rate provisions in the Staggers Act.[23] Moreover, as the brief of the United States documents, the Commission has authorized broad exemptions from regulation for various commodities,[24] and the courts have sustained exemptions for all transportation in "piggyback"

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[22] Each of the proponents for review makes this point with varying degrees of urgency. The Commission's petition (at 11) claims that the decision "will effectively preclude the ICC from any significant use of the exemption power. . . " The railroads allege (at 21) that the decision "effectively nullifies Congress" intent in enacting the exemption provision to authorize broad exemptions from regulation." The United States (at 14) argues that the decision "would make it virtually impossible for the Commission to implement the provision in the manner Congress intended."

[23] Pet. App. 37a, 39a, 47a. Hence, the brief of the United States incorrectly describes the "Question Presented" as whether the Commission was required to engage in a detailed analysis of various factors. The two petitions set forth similar "Questions Presented".

[24] For example, it has exempted fresh fruits and vegetables, other major agricultural commodities, and frozen foods, and has removed all regulation under the "long and short haul provisions" of 49 U.S.C. 10726. See 49 C.F.R. §§1039.10, *et seq.* (1984).

equipment,[25] the exemption of boxcar traffic from maximum rate regulation,[26] and the exemption of states and their contract operators from the labor protective provisions of the Interstate Commerce Act.[27]

The correct view of the vitality of the exemption provision is that of ICC Chairman Taylor. In voting against pursuing further review of the Court of Appeals' decision, he stated that the remand "will have no adverse precedential impact and . . . will not impede our continued use of the Staggers Act exemption provision to properly deregulate the railroad industry."[28]

c. The Court of Appeals' decision correctly carries out the Congressional purpose in enacting the Staggers Act as a whole and especially the exemption provision. According to ICC Chairman Taylor, the decision "merely reaffirmed the mandate from Congress, as set forth in the Staggers Act, that we consider and balance all relevant competing interests in determining whether an exemption falls within the ambit of the National Transportation Policy."[29]

The Staggers Rail Act of 1980 is a regulatory reform act, maintaining regulation in specified instances (Pet. App. 9a). Several efforts to remove virtually all regulatory provisions applicable to rail transportation failed during the 96th Congress.[30] A

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[25] American Trucking Ass'ns v. ICC, 656 F.2d 1115 (5th Cir. 1981).

[26] Brae Corp. v. United States, 740 F.2d 1023 (D.C. Cir. 1984), petitions for cert. pending on other issues, Nos. 84-550,-867.

[27] Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982).

[28] Notation vote memorandum to the Commission from Chairman Taylor, Oct. 10, 1984, attached to Oppositions to Motions for Stay of Issuance of Mandate Pending Petition for Writ of Certiorari, Coal Exports Ass'n, *et al.* v. ICC (D.C. Cir., No. 83-1629, filed Oct. 29, 1984).

[29] *Id.*

[30] During the first session of the 96th Congress, the Senate Commerce Committee rejected S.796, which would have completely deregulated rail transportation five years after enactment, and introduced a new bill, S.1946, which the Senate subsequently passed. 126 Cong. Rec. S3312 (daily ed., April 1, 1980). The House adopted the "Eckhardt-Rahall Amendment,"

principal cause of their failure was that they proposed to eliminate what Congress concluded are the legitimate rights of captive shippers to regulatory protection against high rail rates. Foremost was Congress' concern and direction that shippers of coal—which are naturally dependent on rail transportation—not be left vulnerable to unreasonably high rates.[31] After a protracted legislative debate, Congress adopted a compromise that moved toward greater reliance on market forces, but (as the Court of Appeals stated) tempered "that move with a policy of retaining regulation where the market would be insufficient to protect shippers and the public from abusive railroad practices" (Pet. App. 9a).

The Court of Appeals correctly pointed out that the Staggers Act's "record and legislation is filled with references to these concerns both as the reasons for deregulation and *as the limits of deregulation*" (Pet. App. 4la, emphasis in original).[32] It recognized that the exemption section is not, as the Commission's decision would make it, a carte blanche for the ICC to undo Congress' compromise. Section 10505 does not authorize the Commission to circumvent Congress' statutory provisions maintaining regulatory recourse against unreasonable rates for coal

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defeating the bill reported by the House Interstate and Foreign Commerce Committee. The bill ultimately passed by the House was far different from that reported by the House Committee. See note 3, *supra*.

31 The Conference Report conveyed Congress' will that the rail transportation policy be particularly applied to prevent rates for coal from being unreasonably high:

> The Conferees intend that this policy include the encouragement and promotion of the transportation of coal by rail in accordance with the objective of energy independence at rates which do not exceed a reasonable maximum where there is an absence of effective competition.

H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. at 80 (1980).

32 Also, it comports with the Supreme Court's admonition in remanding another agency's decision to deregulate that "the forces of change do not always or necessarily point in the direction of deregulation." Motor Vehicle Mftrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S.Ct. 2856 (1983).

shippers subject to rail market power. The Court properly required that section 10505 be read consistently with these shipper protections, relying on the language of section 10505 as well as the structure and purpose of the entire Act.[33] While it noted that Congress intended the exemption provision to be one "cornerstone" of the Staggers Act, it correctly refused to equate that expression with unlimited agency authority that would dismantle the Act's foundation of a balance of the twin goals of rate flexibility and captive shipper protection.[34]

The parties supporting issuance of a writ characterize the exemption provision as mandating the Commission to experiment with deregulation. In support they cite the ICC's authority in section 10505(d) to revoke an exemption and legislative history, including selected words in the section-by-section analysis in the Conference Report. Petitioners and the Commission's decision, however, fail to accept the conditional nature of section 10505(a), and the incompatibility of their position with the statute and Gongressional purpose that repeatedly emphasizes

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[33] Every court of appeals that has reviewed a decision under section 10505 has carefully analyzed Congress' intent about the maintenance of particular regulatory protections. *See, e.g.*, American Trucking Ass'ns v. ICC, 656 F.2d 1115 (5th Cir. 1981); Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982).

[34] The brief of the United States argues that the Court misunderstood the nature of the exemption authority. The brief incorrectly states (at 13) that "Congress intended the *exemption authority* to reflect a 'totally new approach to the railroad industry'" and ascribes that statement to Representative Staggers. However, the quoted portions of Mr. Staggers' statement are directed at the entire conference bill, not the exemption section. 126 Cong. Rec. H10084, 10085 (daily ed., Sept 30, 1980). With respect to the exemption section, he said it "has been carefully drafted to limit regulation to the bare essentials necessary to protect against abuses of market power." *Id.*

In addition, the references to the report of the House Interstate and Foreign Commerce Committee are inapposite because that Committee's bill was rejected on the House floor, and it was the Senate Committee's exemption provisions that the conferees accepted in the final bill. Its report (*infra* note 35), therefore, is entitled to greater weight than the House Committee Report. *See* Crown Central Petroleum Corp. v. Federal Energy Administration, 415 F. Supp. 60, 62 (D.D.C.), *aff'd*, 542 F.2d 69 (T.E.C.A. 1976).

those elements of the statute that protect shippers against unreasonable rates.

The Court's insistence that the Commission's decision turn on the articulation of a lawful "abuse of market power" standard is well-supported by that section's legislative history. The Senate Committee Report states that the purpose of the language in section 10505(a)(2), to "protect shippers from an abuse of market power," is

> to reemphasize the Committee's concern that greater use of the exemption power should not be at the expense of captive shippers who have no reasonable transportation alternatives.[35]

The Conference Report stresses that the exemption provision is to be used only to examine "specific regulatory provisions and practices not yet addressed by Congress to determine whether they can be deregulated consistent with the policies of Congress."[36] The Court of Appeals corrected the ICC's erroneous use of the exemption section to remove the very statutory provisions that Congress, after many months of deliberation, voted to maintain for captive shippers of coal and other bulk commodities.

d. The Court of Appeals' decision is in accord with precedent. The Court followed *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778 (1984), which held that a court should not defer to an agency decision where "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 2783, *quoting United States* v. *Shimer*, 367 U.S. 374, 383 (1961). "[T]he courts are the final authorities on issues of statutory construction," and their deference to an agency's interpretation "cannot be allowed to slip into a judicial inertia" or "rubber-stamp[ing]" of agency decisions inconsistent with a statutory mandate or congressional policy. *Volkswagenwerk A.G. v.*

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[35] S. Rep. No. 470, 96th Cong., lst Sess. at 43 (1979).

[36] H.R. Conf. Rep. 1430, *supra*, at 105.

FMC, 390 U.S. 261, 272 (1968). Petitioners' argument that the Court of Appeals impermissibly substituted its judgment for the Commission's is not valid.

The ICC standard here is comparable to an oil pipeline rate standard promulgated by the Federal Energy Regulatory Commission (FERC) and recently vacated in the *Farmers Union* case because it contravened the statutory directive to determine whether rates are "just and reasonable".[37] *Farmers Union* held that Congress intended the FERC's rate regulation rules to do more than merely prevent "grossly abusive rates".[38] The United States opposed Supreme Court review, arguing, that the Court of Appeals had correctly relied on legislative history to reject FERC's interpretation of the statute.[39]

The similarities of the statutory requirements and of their misinterpretation by the respective agencies in *Farmers Union* and this case are manifest. Like the "just and reasonable" standard for oil pipeline rates, the exemption provision for railroads requires the maintenance of regulation where necessary to protect shippers from an abuse of market power. Both agency decisions contain standards not reconcilable with these legislative commands, and were correctly set aside.

e. Factually, this is a poor case for Supreme Court review. To support its decision, the ICC majority presented a collection of speculation, unsupported assertions, and anecdotal evidence, which were vigorously contested by shippers and in the dissent. As Chairman Taylor said, the majority's factual account amounted to a "summarization of the proponent railroads' comments . . . ." (Pet. App. 92a). Although the Court did not rest its decision on whether the majority's determinations were arbitrary

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[37] Farmers Union Cent. Exchange v. FERC, 735 F.2d 1486 (D.C. Cir.), *cert. denied*, 105 S.Ct. 507 (1984).

[38] *Id.* at 1504.

[39] Brief of United States in Williams Pipe Line Co. v. Farmers Union Cent. Exchange, Inc., Nos. 84-184,-185 and-186 (at 17).

and capricious, it treated the arbitrariness challenge as "closely interrelated" with the basis of its ruling (Pet. App. 7a, 45a-46a).

Among the key elements of the Commission's decision which are plainly wrong are, first, its ruling that section 1010la(6) and the Conference Report's instruction to maintain reasonable rates for coal do not apply to export coal (Pet. App. 71a). The Court correctly observed that the provisions apply. (Pet. App. 35a). For its conclusion that historically regulation had not been needed to restrain rates for export coal, the ICC asserted that shippers had not complained about rate levels. However, the Commission's records contain three protests filed by the Coal Exporters Association in the 1970's, plus that party's pending complaint against all export coal rates, which was filed prior to institution of the exemption proceeding (Pet. App. 25a). To support its finding of effective competition from other forms of transportation, the Commission cited coal slurry pipelines, even though there are none (Pet. App. 77a, n.42; *cf.*, Pet. App. 95a). It pointed to effective truck competition when all parties, as the Court noted, agreed that the statistic cited by the majority was invalid (Pet. App. 22a, n.13). Because of these and other arbitrary and capricious determinations, the ICC's decision would be invalid, even if the Court's ruling on the unlawfulness of the ICC's interpretation of the Act's legal standards were modified.

f. There is no direct conflict among the circuits. This is the first case in which the courts have been called to review an ICC decision removing maximum rate regulation for traffic subject to significant railroad market power.

Nor is there a conflict in principle. The decision below is consistent with the other appellate decisions reviewing exemptions under section 10505. Like this case, each has turned on a searching analysis of Congressional intent about the specific subject of the exemption so that a proper evaluation can be made as to whether maintenance of regulation is necessary "to carry out the transportation policy." Where the exemption is consistent

with Congress' intent, the ICC has been sustained; when in conflict, it has, as here, been reversed.[40]

American Trucking Ass'ns v. ICC, 656 F.2d 1115 (5th Cir. 1981), is the only decision under section 10505 decided by another circuit.[41] There the court sustained the exemption of intermodal rail-truck traffic, in large part, because the Staggers Act addressed the desirability of deregulating this traffic. However, it reversed the inclusion of the Alaska Railroad in the exemption because that conflicted with the rail transportation policy most relevant to that case. 656 F.2d at 1120, 1128.[42]

Petitioners N&W *et al.* incorrectly assert (at 23) that the Court of Appeals' decision conflicts with *American Trucking*

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[40] Three other decisions under section 10505 have been reviewed by a court of appeals. McGinness v. ICC, 662 F.2d 853 (D.C. Cir. 1981) (exemption remanded for modification); Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982) (exemption upheld); Brae Corp. v. United States, *supra* (exemption upheld in part; vacated in part). These cases stand for the proposition followed in the present case that the Commission may not exercise its exemption power where doing so would be inconsistent with Congressional intent regarding the maintenance of particular statutory protections.

[41] Brae Corp. v. United States, *supra*, of course, cannot be the basis for a conflict between circuits. No party asked for a rehearing or *en banc* consideration of any perceived conflict between *Brae* and the current case. Nonetheless, the railroads' petition (at 24) argues that this case conflicts with the Court's affirmance in *Brae* of the removal of maximum rate regulation for box car traffic, while the Commission's (at 11, 12) considers the rejection of the exemption of joint rates to be similar to the present case. Part of the box car exemption was reversed in *Brae* because the ICC committed the same transgression there as it did in the export coal case: it failed to take into account the critical rail transportation policies. 740 F.2d at 1050. That part of the *Brae* decision upholding the ICC's removal of maximum rate regulation for box cars was based on facts not present in the export coal exemption decision—extensive studies showing that the post-exemption rates for box car traffic would not be high enough to subject them to ICC maximum rate jurisdiction, much less be unreasonable. 740 F.2d at 1037, 1040-1042.

[42] The Fifth Circuit applied the "arbitrary and capricious" test in *American Trucking Ass'ns*. The D.C. Circuit did not reach that question in the instant case, finding that the ICC's legal standards are unlawful.

Ass'ns because the former requires for an exemption a finding of either "effective competition" or that post-exemption rail rates would be reasonable, but *American Trucking Ass'ns* does not. However, in *American Trucking Ass'ns*, the ICC specifically found "effective competition" on the basis of the railroads' loss of market share to trucking. Since there was effective competition, neither the ICC nor the Fifth Circuit reached the question whether post-exemption rates would be reasonable. 656 F.2d at 1125, 1126. In the instant case the ICC made no "effective competition" determination, and, instead, wrongly interpreted and addressed the statutory tests whether world competition for coal constrains rail rates for export coal and whether the railroads would be able to appropriate all of the economic rents.[43]

The petitions are not strengthened by the United States' argument (Brief, 14) that review should be granted because this is a decision by the District of Columbia Circuit, which has jurisdiction over ICC decisions.[44] That circuit's jurisdiction is not exclusive. *See American Trucking Ass'ns v. ICC*, 656 F.2d 1115 (5th Cir. 1981); *Western Coal Traffic League v. United States*, 719 F.2d 772 (*en banc*)(5th Cir. 1983), *cert. denied*, 104 S.Ct. 2160 (1984). Nor has the D.C. Circuit a record of reversing exemptions or other ICC decisions under the Staggers Act. It affirmed the exemption of states and contract operators from the labor protective provisions of the Act,[45] and box car

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[43] The railroads incorrectly argue that the lower court set the ICC's decision aside because the Commission had not found the railroads have "zero market power" (N&W Pet., i). Rather, it was because the Commission made no finding that the railroads face "effective competition" (Pet. App. 35a) that the Court reviewed whether the carriers would abuse their market power.

[44] Nor are the requests for review advanced by the observation (N&W Pet., 17) that the Supreme Court has not yet construed a single provision of the Staggers Act. That the Court has not yet resolved any question regarding the Act as a whole has never been recognized as a basis for the grant of certiorari. Here, the "newness of the statutory scheme" and the lack of guidance provided by the agency in its decision (see Pet. App. 40a) further argue against granting the writ.

[45] Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982).

traffic from the maximum rate sections.[46] The same court upheld the ICC's rules governing minimum rail rates, a maximum rate decision favorable to the railroad, rules for calculating allowable inflation increases, and the ICC's approach to implementing the "Long-Cannon Amendment" to the Staggers Act.[47]

[46] Brae Corp. v. United States, *supra*.

[47] Water Transport Ass'n v. ICC, 684 F.2d 81 (D.C. Cir. 1982); Potomac Electric Power Co. v. ICC, 744 F.2d 185 (D.C. Cir. 1984); Western Coal Traffic League v. ICC, 677 F.2d 915 (D.C. Cir.), *cert. denied*, 459 U.S. 1086 (1982); Arkansas Power & Light Co. v. ICC, 725 F.2d 716 (D.C. Cir. 1984).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respondents Nippon Steel Corp., Nippon Kokan K.K., Sumitomo Metal Industries, Ltd., Kawasaki Steel Corp., Kobe Steel Ltd., and Nisshin Steel Co. support this brief. Respondent Patrick W. Simmons, Illinois Legislative Director for the United Transportation Union, has authorized the representation that he opposes the grant of writs of certiorari for reasons set forth in this brief.

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